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APPELLANT PRO SE:

DAVID E. HAWES
Michigan City, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID E. HAWES,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 82A01-0602-CR-67
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable William H. Miller, Judge
Cause No. 82D02-9912-CF-1049

September 29, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Chief Judge

David E. Hawes appeals the trial court's order denying his petition for leave to file a belated notice of appeal.

We reverse.

FACTS AND PROCEDURAL HISTORY

On September 5, 2000, Hawes pled guilty but mentally ill to two counts of child molesting¹ as Class A felonies, and sentencing was left to the discretion of the trial court. On September 14, 2000, the trial court sentenced Hawes to forty years for each count with the sentences to run consecutively for a total of eighty years. While incarcerated, Hawes filed a petition for post-conviction relief on July 31, 2002, which was denied by the trial court. In this petition, Hawes did not raise any challenge to his sentence. On December 19, 2005, Hawes filed a petition for leave to file a belated notice of appeal, which the trial court denied on February 10, 2006. Hawes now appeals.

DISCUSSION AND DECISION

Indiana Post-Conviction Rule 2 permits a defendant to seek permission to file a belated notice of appeal. The rule provides in pertinent part:

Where an eligible defendant convicted after a trial or plea of guilty fails to file a timely notice of appeal, a petition for permission to file a belated notice of appeal for appeal of the conviction may be filed with the trial court, where:

- (a) the failure to file a timely notice of appeal was not due to the fault of the defendant; and
- (b) the defendant has been diligent in requesting permission to file a belated notice of appeal under this rule.

¹ See IC 35-42-4-3.

Ind. Post-Conviction Rule 2(1). Although there are no set standards defining delay and each case must be decided on its own facts, a defendant must be without fault in the delay of filing the notice of appeal. *Baysinger v. State*, 835 N.E.2d 223, 224 (Ind. Ct. App. 2005). Factors affecting this determination include the defendant's level of awareness of his procedural remedy, age, education, familiarity with the legal system, whether he was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. *Id.*

Whether a defendant is responsible for the delay is a matter within the trial court's discretion. *Id.* "Although we acknowledge that the trial court is generally in a better position to weigh evidence and judge witness credibility and we defer to that discretion, such is not always the case." *Id.* Where, as here, the trial court does not hold a hearing before granting or denying a petition to file a belated notice of appeal, the only basis for its decision is the paper record attached to the petition. *Id.* Because we are reviewing the same information that was available to the trial court, we owe no deference to its findings. *Id.* We therefore review the denial of Hawes's petition *de novo*. *See id.*

Hawes argues that he was entitled to file a belated notice of appeal under P-C.R. 2 and that the trial court erred when it denied him permission to do so. He contends that his failure to file a timely notice of appeal was through no fault of his own because at his plea hearing neither his trial counsel nor the trial court advised him of his right to appeal his sentence. He also claims that he was diligent in requesting permission to file a belated appeal.

In *Baysinger*, the defendant pled guilty in an open plea, which left the sentencing to the discretion of the trial court, and four years later, he filed a petition to file a belated appeal,

which was denied. *Id.* On appeal, the defendant claimed that his petition should not have been denied because the trial court failed to inform him of his right to appeal any sentence imposed after a guilty plea. *Id.* at 225. We concluded that the defendant's failure to file a timely direct appeal was not due to his own fault and reversed the trial court's denial of permission to file a belated appeal. *Id.* at 226. *See also Perry v. State*, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006), *trans. denied* (finding that failure to file timely notice of appeal was not defendant's fault when trial court did not separately advise him of his right to directly appeal his sentence); *Hull v. State*, 839 N.E.2d 1250, 1254 (Ind. Ct. App. 2005) (concluding that defendant was not responsible for the delay in filing a timely notice of appeal because the trial court failed to advise him of his appellate rights).

Here, at Hawes's plea hearing, the trial court did not inform him of his right to appeal any sentence that was imposed by the trial court. In fact, the trial court told Hawes that as a result of his guilty plea, he was giving up his right to appeal. Additionally, at his sentencing hearing, Hawes was again not informed of his right to appeal his sentence. "It is well-settled that a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised its discretion." *Collins v. State*, 817 N.E.2d 230, 231 (Ind. 2004). Because here the trial court failed to inform Hawes of his appellate rights, we conclude that his failure to file a timely notice of appeal was not his fault.

Hawes also contends that he was diligent in pursuing permission to file a belated notice of appeal. On November 9, 2004, *Collins* was handed down. In it, our Supreme Court clarified that when a defendant pleads guilty in an open plea agreement, he must challenge

any sentence imposed on direct appeal, and not by way of a petition for post-conviction relief. *Id.* Hawes filed his petition for leave to file a belated notice of appeal on December 19, 2005. We conclude that Hawes filed his petition with sufficient diligence for an incarcerated individual with limited access to legal counsel and a law library. The trial court abused its discretion in denying Hawes's petition for leave to file a belated notice of appeal.

Reversed.

SHARPNACK, J., and MATHIAS, J., concur.